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No. 09-200

Supreme Court, U.S.
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In The

Supreme Court of the United States

CYRUS Y. KIM,

Petitioner,

vs.

CITY OF FEDERAL WAY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT CITY OF FEDERAL WAY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner raises six questions for review, however, the pertinent question presented is whether Petitioner makes a sufficient showing that this petition is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination by this Court, wherein he claims that the City of Federal Way, Washington's park ordinances violated his fundamental right to hit golf balls in a public park?

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STATEMENT OF THE CASE

An appeal of the District Court's decision dismissing Petitioner's case is still pending in the 9th Circuit Court of Appeals. Therefore, pursuant to *Supreme Court Rule 11*, Petitioner must provide a sufficient showing that "the case is of such imperative public importance as to justify deviation from normal practice and to require immediate determination" by this Court. Petitioner's stated reasons as to why this case is of such "imperative public importance" is "because City of Federal Way's park ordinances are continuously limiting 80,000 residents' liberty without due process of law." (Pet. For Writ p. 1, 37) Such a claim is remarkable in its lack of substance.

Petitioner brought suit in Federal Court in the Western District of Washington challenging the constitutionality of the city ordinances that prohibited golf, among other things, and provided for expulsion from the park in the event of two or more violations of park rules in a one year period. Petitioner was warned and asked to stop hitting golf balls on one occasion, admits he saw the sign prohibiting golf, but proceeded to hit golf balls again, on another day. As a result he received a notice that if he was seen in the park again, within a one year period, he could be cited for trespassing. Plaintiff claimed his due process rights were violated and he had a fundamental right to hit golf balls for exercise in the park. There are no allegations that any other citizens have a problem with the city park ordinance prohibiting golf.

The District Court granted the Respondent's Motion for Summary Judgment and dismissed the case, referring to the claims as "frivolous." (Order Granting Motion for Summary Judgment, Pet. For Writ, appendix, p. 42)

REASONS FOR DENYING THE WRIT

1. This matter does not approach the standard for finding "such imperative public importance" that "immediate determination" from the Court is "required."

Petitioner's explanation as to why such import attaches to this case is not based upon facts, law or anything rational. Petitioner makes no attempt to cite any authority or analysis as to why review should be accepted.

2. The District Court's decision was correct because the City of Federal Way's park regulations are constitutionally sound.

A party challenging a statute on the basis that the statute violates the Due Process Clause of the Fourteenth Amendment bears the burden of demonstrating the scheme's unconstitutionality. ***Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001).** Both substantive and procedural due process require a protected liberty or property interest to be deprived by state action. The first inquiry in every due-process

challenge is whether the complaining party has been deprived of a protected interest in "property" or "liberty." *See* ***Am. Mfrs. Mut. Ins. Co. v. Sullivan,*** **526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999);** ***Mathews v. Eldridge,*** **424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).**

a. Petitioner's contention that a fundamental right has been infringed upon is baseless.

If a fundamental right is involved, the State must show a compelling interest. Substantive due process forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *See, e.g.,* ***Collins v. Harker Heights,*** **503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992);** ***Bowers v. Hardwick,*** **478 U.S. 186, 191, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).** However, merely having a liberty or property interest guaranteed by the constitution is not equivalent to having a fundamental right. The court in ***Doe v. City of Lafayette,*** **377 F.3d 757, 772 (7th Cir.2004)**, examined an issue similar to that at bar:

> Our first duty is to provide a "careful description" of the liberty interest that Mr. Doe seeks to have protected. ***Washington v. Glucksberg,*** **521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).** Then, we must ask whether that interest is "fundamental,"

> that is, whether it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." ***Id.* at 720-21, 117 S.Ct. 2258** (internal quotation marks and citations omitted). In undertaking these inquiries, we must remain mindful of the Supreme Court's admonition that we ha[ve] always been reluctant to expand the concept of substantive due process because guide-posts for responsible decision making in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. ***Id.* at 720, 117 S.Ct. 2258** (internal quotation marks and citations omitted); *see also* ***Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir.1995)**.

Doe v. City of Lafayette*, 377 F.3d 757, at 768**. In ***Lafayette, the plaintiff was a convicted sex offender that was banned from entering public parks. He sued, claiming the ban violates his constitutional rights. The Court analyzed caselaw and concluded that there was no authority for the proposition that the right to enter and loiter in a park is a "fundamental right." In

the case at bar, the Petitioner states that he has a fundamental right to exercise and hit golf balls in a park. Petitioner cites the case of ***Evans v. Newton*, 382 U.S. 296 (1966)**, for the proposition that a fundamental right to enter a park exists. However, the ***Evans*** case is an Equal Protection case, wherein the Defendant had sought to exclude citizens based upon their race. The case at bar is not an Equal Protection or First Amendment expression case.

There is no authority for the proposition that a citizen has a fundamental right to exercise or golf in a public park.

Because a ban on playing golf in a park, or even entering a park, does not infringe upon a fundamental right, the question in the case at bar involves the "rational basis standard." *See* ***Doe v. City of Lafayette*,** supra; ***Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir.2001); *Simi Inv. Co. v. Harris County*, 236 F.3d 240 (5th Cir.2000)**.

b. Petitioner's claim that the City of Federal Way has no authority or basis for the park ordinance is in error.

The test of whether a regulation which does not affect a fundamental right violates substantive due process is whether the government was acting in pursuit of permissible state objectives and, if so, whether the means adopted were reasonably related

to accomplishment of these objectives. ***Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir.2001); *Simi Inv. Co. v. Harris County*, 236 F.3d 240 (5th Cir.2000)**.

The ***Washington State Constitution, article 11, section 11***, provides "*Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.*" Furthermore, **RCW 35.22.280**, provides authority for the City of Federal Way to establish and regulate parks. The City code sections in dispute, **FWCC 11-55** (Pet. For Writ p. 16) and **FWCC 11-75** (Pet. For Writ p. 17-18) are proper enactments of the City's authority. **FWCC 11-55** is the ordinance that sets out the reasons a person can be expelled from the park. Appellant was "trespassed" from the park for violating sub paragraph (b)(5), *committing more than one violation of this article within any 12-consecutive month period.* It is unclear from Petitioner's complaint how that section of the ordinance violates due process. Petitioner admits to getting caught violating the park ordinance twice in a 12-consecutive month period. **FWCC 11-75** makes it unlawful to play golf in the park. Petitioner was caught doing so and advised of the violation. He decided to disobey the rule. His complaint makes it clear that he did so to get exercise. Certainly there are other ways to exercise, and other places to golf. **FWCC 11-75** states that the purpose of the regulation is to avoid interfering with or putting at risk

other park users. Clearly, enjoyment and safety of park users is a legitimate City concern.

CONCLUSION

Petitioner's writ must be denied.

RESPECTFULLY SUBMITTED September 16, 2009.

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